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No. 96-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ALLSTATE LIFE INSURANCE COMPANY,
Petitioner,

vs.

MICHAEL HIBMA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF ARIZONA

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES IN SUPPORT OF PETITIONER

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Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Association of California Life and Health Insurance Companies ("ACLHIC") respectfully requests leave to file the accompanying *amicus curiae* brief in support of Petitioner Allstate Life Insurance Company's ("Allstate") Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona. Counsel for Allstate has consented in writing to ACLHIC filing an *amicus curiae* brief; counsel for Respondents Michael Hibma et al. has declined to consent.[1]

ACLHIC is a California non-profit trade association whose members are domestic California life and health insurance companies. ACLHIC members also include foreign life and health insurance companies which do business in California. One of the primary purposes of ACLHIC is to represent the interests of its members, for their benefit and that of their policyholders, in substantial public policy matters which affect them. Many of ACLHIC's members insure

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[1] Petitioner Allstate has made a monetary contribution to the preparation and submission of the present motion and accompanying brief. This motion and accompanying brief have not been authored in whole or in part by counsel for any party.

employee welfare benefit plans and, as such, are directly impacted by the decision of the Court of Appeals of the State of Arizona's decision in this action (and the denial of review by the Arizona Supreme Court) (hereafter "the Decision"). The Decision is premised in large part on an erroneous and overruled decision of the California Court of Appeal in *Sayble v. Blue Cross of Southern California*, 256 Cal.Rptr. 820 (1989) (depublished by order of the California Supreme Court dated June 8, 1989), and therefore is of further interest to ACLHIC.

At stake are the uniform regulation and certainty of the administration and remedies which lie at the heart of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Decision is in conflict with the decisions of United States Courts of Appeals, and the controlling California law set forth in a decision of the California Supreme Court issued subsequent to *Sayble*. The Decision also decides an important question of federal law in a way that conflicts with relevant decisions of this Court concerning the breadth and scope of ERISA. This Court should clarify the all-important test for determining when an ERISA plan exits. It should reject the conclusion of the Court of Appeals of the State of Arizona that the uniform protection of ERISA plan participants under

federal law, preemption of dissimilar laws of the several states and the scope of permissible remedies available to participants is to be determined by whether the employer establishing the plan engages in administrative conduct sufficient to invoke "ERISA policy."

For the foregoing reasons, ACLHIC respectfully requests leave to file the accompanying *amicus curiae* brief.

Dated: May 16, 1997

Respectfully Submitted,

By: J. Russell Stedman

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STATEMENT

The statement of this case is set forth in Allstate's Petition, which statement is adopted here.[1]

INTEREST OF *AMICUS CURIAE*

The Association of California Life and Health Insurance Companies ("ACLHIC") is a California non-profit trade association whose members are domestic California life and health insurance companies. ACLHIC members also include foreign life and health insurance companies which do business in California. One of the primary purposes of ACLHIC is to represent the interest of its members, for their benefit and that of their policyholders, in substantial public policy matters which affect them. Many of ACLHIC's members insure employee welfare benefit plans and, as such,

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[1] Petitioner Allstate has made a monetary contribution to the preparation and submission of this brief. This brief has not been authored in whole or in part by counsel for any party.

are directly impacted by the decision of the Court of Appeals of the State of Arizona (the "Decision"). The Decision is premised in large part on an erroneous and overruled decision of the California Court of Appeal in *Sayble v. Blue Cross of Southern California*, 256 Cal.Rptr. 820 (1989) (depublished by order of the California Supreme Court dated June 8, 1989), and therefore is of further interest to ACLHIC.

SUMMARY OF ARGUMENT

It would not be an overstatement to describe Allstate's Petition as presenting the most important issue concerning ERISA since *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). The question is whether this Court will sanction through silence an unfounded limitation on the application of ERISA to employee welfare benefit plans. The issue affects hundreds of millions of individuals and the majority of employee welfare benefit plans in this country. At stake are the Congressional goals of encouraging the formation and proper administration of welfare benefit plans, uniformity of application of ERISA, preemption of varying state laws, and securing ERISA rights and remedies for plan participants.

The insurance industry, employers and plan participants need clarity, certainty and uniformity of law. "Meaningful" administration by employers should not be required and could discourage the establishment of privately funded employee plans. Employers often arrange for insurance companies or other administrators to provide professional, specialized services to deliver plan benefits to their employees, a field with little or nothing to do with the employer's business. The employer should not be required to undertake some uncertain level of administration of the plan in order to bring it within ERISA, nor should the employer incur the inevitable increased costs associated with either assuming such administration, or establishing a benefit plan which may not be within the scope of ERISA and therefore subject to varying laws, remedies and rights.

ACLHIC, speaking on behalf of its insurance company members and the insurance industry, supports the Department of Labor and the United States Courts of Appeal which have determined that an ERISA plan is easily established. A plan should be recognized as subject to ERISA if it meets minimum standards and not tested by a subjective

case-by-case analysis of whether the employer's administration invokes some ERISA policy. The Decision is based on the erroneous, unfounded, depublished and overruled decision in *Sayble*, *supra*, and conflicts with the plain language of the statute which defines an ERISA plan, 29 U.S.C. §1002(1). The Petition for Review should be granted, and this Court should reject the limitations on ERISA that the Court of Appeals of the State of Arizona has created.

ARGUMENT

1. The Court Should Grant The Petition For A Writ Of Certiorari To Establish A Clear Test For When An Employee Benefit Plan Is Subject To ERISA And To Protect Uniformity Of ERISA Regulation

Allstate's Petition presents the Court with the opportunity to establish a clear, uniform test for determining when ERISA governs an employee benefit plan. The scope and impact of ERISA regulation have been the subject of numerous decisions of the Court, but the threshold issue of when an ERISA plan has been established has not yet been squarely addressed.

The Court of Appeals of the State of Arizona has determined that the majority of America's employee health benefit plans--those where the employer simply purchases insurance and/or delegates administration to some other entity--are *not* covered by ERISA. The Decision creates troublesome and unwarranted distinctions based on employer activity. Congressional goals underlying the enactment of ERISA, and subsequent amendments to ERISA, will be eviscerated if the millions of smaller and medium-sized "garden-variety" employee benefit plans do not enjoy ERISA's protections.

To encourage the growth and development of employee benefit plans, Congress desired a unified system of regulation of plans to replace a patchwork of state and local rules and remedies. *See, Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987). An important goal of ERISA is to encourage efficient administration of employee benefit plans because inefficiencies caused by conflicting state regulations might result in a lowering of benefit levels, elimination of benefits or benefits not being provided in the first instance.

Shaw v. Delta Airlines, Inc., 463 U.S. 85, 105 n.25 (1983); *see also Fort Halifax*, *supra* at 11.

To accomplish ERISA's goals, employers, plan administrators and plan participants need clarity, certainty and uniformity of law. It is obvious that employers seek out insurance companies and plan administrators in order to obtain the benefit of professional, specialized administrative services:

> [O]ver 148 million individuals in the United States are covered by private sector employer-sponsor group health insurance that is virtually identical to the coverage in this case, and, for 91% of these plans, the employers do *not* handle plan administration.[2]

Requiring employer administration in order for ERISA to apply would discourage establishment of privately funded

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[2] Allstate's Petition, p. 2 (footnote omitted) (emphasis in original).

employee benefit plans and increase the costs of administration.[3] Plan administrators would face the unenviable task of weighing the quantity and quality of the employer administration in deciding whether or not ERISA applied. Assuming the plan administrator reached the correct conclusion, only then would it be able to properly administer the plan either under ERISA, or under one or more of the governing laws of one of 50 states. Resulting inefficiencies would cause increased premiums, reductions in benefits or inability of employers to obtain needed insurance. Such a result would not serve the purpose of ERISA, and in fact threatens the benefits of ERISA to participating American workers.

This Court should grant the Petition of Certiorari in order to establish with finality the test for determining whether

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[3] *See* Allstate's Petition, at n. 21, noting the substantially higher administrative expenses per participant for smaller plans.

a plan is one subject to ERISA. The need for uniformity is great, and the apparent minority trend focusing on employer administration is damaging.

2. The Court Of Appeals Of The State Of Arizona Has Created An Improper Requirement That An Employer Must Engage In "Meaningful" Administration Of An Employee Welfare Benefit Plan In Order For ERISA To Apply

The Court of Appeals of the State of Arizona has created a test succinct in description, but subjective, confusing and likely to result in widely varying applications:

> The line between and ERISA plan and a non-ERISA plan depends to some extent on the level of employer involvement that would justify federal regulation of plan administration . . . . If there is no potential for `employer abuses such a self-dealing, imprudent investing, and misappropriation of

plan funds,' the aims of ERISA are not a stake. (3a).[4]

The test created by the Arizona court contradicts the plain language of 29 U.S.C. §1002(1) which provides that a plan is subject to ERISA if "established and maintained" by the employer to provide certain types of benefits. No requirement of employer administration is included in that statute's definition of what constitutes an ERISA plan. The Ninth and the Sixth Circuits have held that an employer can establish an ERISA plan by doing nothing more than arranging a "group type insurance program." *Credit Managers Ass'n v. Kennesaw Life & Acc. Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987); *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, 492 (9th Cir. 1988) cert. den'd, 492 U.S. 906 (1989); *International Resources, Inc. v. New York Life Ins. Co.*, 950 F.2d 294, 297-98 (6th Cir. 1991), cert. den'd, 504 U.S. 973

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[4] Citations omitted. In the present case, the Court of Appeals of the State of Arizona found that the employer's involvement was "so negligible, so lacking in anything meaningful to the enforcement of ERISA policy, that preemption does not apply in this case." (14a)

(1992). The Department of Labor has adopted regulations which establish the minimal employer participation necessary to subject a plan to ERISA regulation. *See* 29 C.F.R. §2510.3-1(j). Despite this authority, the tremendous breadth of ERISA, and the Congressional goals promoted by uniformity of regulation, the Court of Appeals of the State of Arizona elected to follow questionable state law precedent with its genesis in *Sayble, supra*, a now depublished and overruled California Court of Appeal decision.

Sayble involved an aggressive and unwarranted attack upon ERISA, ruling that an employer must do much more than merely fund premium payments for group insurance in order for ERISA to apply. Without specifying what administrative activity the employer must engage in, the *Sayble* court concluded that absent an employer-operated plan, and the potential for employer abuses such as self-dealing, imprudent investing, and misappropriation of plan funds, the purposes of ERISA would not be served and ERISA would not apply. The *Sayble* decision, which effectively removed all non-employer administered benefit plans from ERISA, was predicated upon this Court's decision in *Fort Halifax*, *supra*.

Fort Halifax involved the issue of whether a *one-time* severance plan mandated by state law was preempted by ERISA. The court concluded that this single payment was not within ERISA because there was no *ongoing plan*:

> The requirement of a one-time lump sum payment triggered by a single event requires *no administrative scheme whatsoever to meet the employer's obligation.* The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize. *Fort Halifax*, *supra*, 482 U.S. at 12 (emphasis added).

Fort Halifax does not support the Decision or *Sayble's* conclusion. An employer paying insurance premiums for group coverage on behalf of its employees *does* face "periodic demands on its assets that create a need for financial

coordination and control." Moreover, employers who purchase group insurance must select the participants, handle enrollment, pay the premiums and therefore maintain financial integrity. Unlike *Fort Halifax*, the establishing and maintaining of a health benefit plan such as that in the present case involves an ongoing plan rather than a possible one-time payment "predicated on the occurrence of a single contingency that may never materialize."

Delegation of administrative activity to an insurer through the purchase of a policy and payment of premiums constitutes an ongoing plan and itself involves administrative activity. By definition, the insurer's investigation, consideration and payment or denial of submitted claims is administrative in nature. The mere fact that, as in over 90% of *all* employee benefit plans[5] the employer delegates administrative obligations to a third party as expressly permitted by ERISA, rather than doing them itself, should not determine whether an ERISA plan has been established.

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[5] Allstate's Petition, p. 2.

Significantly, *Sayble*, and its holding, are not even current California law. *Sayble* was depublished and cannot be cited or relied upon in proceedings before California courts. *See*, California Rule of Court 977. Sayble's legal conclusions were overruled by the California Supreme Court in *Marshall v. Bankers Life & Cas. Ins. Co.*, 2 Cal.4th 1045, 10 Cal.Rptr. 72 (1992), cert. den'd, 506 U.S. 1000 (1992).[6] There, the California court recognized application of ERISA to a plan with no employer activity beyond purchasing an insurance policy, contributing premiums and retaining authority to terminate the policy. *Marshall*, *supra*, 2 Cal.4th at 1057. The California Supreme Court rejected the "employer administration" test, noting that the language of 29 U.S.C. §1002(1) "does not support such a requirement," and that administration of plans is commonly delegated to an insurer or third-party administrator. *Marshall, supra*, 2 Cal.4th at 1052-53. The Court of Appeals for the State of Arizona's

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[6] *Marshall* also effectively overruled another California case relied upon by the Arizona Court of Appeal (3a) which had applied the "employer administration" test, *Rizzi v. Blue Cross of Southern California*, 206 Cal.App.3d 380, 253 Cal.Rptr. 541 (1989), cert den'd 493 U.S. 821 (1989).

reliance on *Sayble* and a decision of the Utah Court of Appeals[7] itself premised on *Sayble*, is unfounded.

This Court should take this opportunity to reject the "meaningful employer administration" test. It should establish the Department of Labor regulations as a minimal standard for application of ERISA, and recognize ERISA application whenever an employer has taken those minimal steps necessary to establish or maintain a benefit plan for its employees as defined in 29 U.S.C. §1002(1). This result will fully serve the Congressional goals of encouraging the establishment of welfare benefit plans, and the concurrent need for uniform regulation to achieve that goal.

CONCLUSION

For the foregoing reasons, *amicus curiae* The Association of California Life and Health Insurance Companies urges this Court to issue a Writ of Certiorari to review the

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[7] *Robertson v. Gen. Ins. Co.*, 828 P.2d 496 (Utah App. 1992).

judgment and opinion of the Court of Appeals of the State of Arizona.

Dated: May 16, 1997

Respectfully Submitted,

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